1980

Car Doctor, Inc v. Anthony Belmont And Gregory Olinyk : Brief of Plaintiff-Respondent

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

CAR DOCTOR, INC.,	:	
Plaintiff and Respondent,	:	
vs.	:	No. 17239
ANTHONY BELMONT and GREGORY OLINYK,	:	
Defendants and Appellants.	:	

BRIEF OF PLAINTIFF-RESPONDENT

Appeal from Judgment of the Third Judicial District Court for Salt Lake County, State of Utah Honorable G. Hal Taylor

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STATEMENT OF THE KIND OF CASE

This is an action to recover $25,000.00 paid by plaintiff to defendants as a contribution for a proposed partnership. Plaintiff contends that it is entitled to return of the funds on the basis of an agreement among the parties that certain conditions would be met before the partnership would become effective and that those conditions were not met. Defendants counterclaimed alleging that plaintiff had failed to meet a commitment to provide additional financing, thereby causing loss of certain business opportunities.

DISPOSITION IN LOWER COURT

The case was tried to the court and judgment was entered in favor of plaintiff in the amount of $25,000.00, plus interest and costs; the defendants' counterclaim was dismissed.

RELIEF SOUGHT ON APPEAL

The judgment of the trial court should be affirmed.

STATEMENT OF FACTS

In about February of 1977, the officers of plaintiff Car Doctor, Inc., David Robinson and Gordon Giles, met the defendants, Gregory Olinyk and Anthony Belmont. (R. 105, lines 9-30; R. 106, lines 1-10.) The parties began negotiations concerning the formation of a partnership to operate a private liquor club and restaurant in Ogden, Utah. (R. 106, lines 20-30.)

On March 4, 1977, the parties executed a preliminary agreement (Exhibit 3-P) setting forth certain conditions which must be met before any partnership among the parties would become effective. The agreement also provided that if the conditions were not met, monies contributed by plaintiff would be refunded. On that same day, plaintiff delivered a check in the amount of $10,000.00, payable to defendant Gregory Olinyk (Exhibit 1-P). The check was delivered to Olinyk and made payable to him based on his representations that the opportunities contemplated for the operation of the partnership business would be lost if monies were not paid immediately. (R. 107, lines 23-27.; R. 108, lines 14-19.)

As a substitute for placing the funds in escrow, and because of the immediate need for cash, defendant Olinyk executed and delivered a promissory note in the amount of $10,000.00 to

plaintiff to guarantee repayment of the funds if the partnership did not become effective. (Exhibit 2-P) (R. 109, line 30; R. 110, lines 1-5, 21-27.)

On March 9, 1977, the parties executed an agreement to govern the operation of the partnership once the conditions were met. (Attachment to Exhibit 3-P.)

On March 11, 1977, plaintiff delivered a check to defendant Anthony Belmont, in the amount of $15,000.00, made payable to defendant Belmont. (Exhibit 4-P.) Again, defendants represented to plaintiff's officers that there was an urgent and immediate need for funds. In addition, defendants indicated that the five (5) conditions set forth in the agreement (Exhibit 3-P) could not be met until the private liquor club, to be known as the Winery, was open and operating and that the club could not be open unless plaintiff provided the funds immediately. (R. 114, lines 17-25.)

The five conditions set forth in Exhibit 3-P were never met. (R. 116, lines 26-30; R. 117, lines 1-2; Findings of Fact, no. 3.)

This action was filed in June of 1977. Defendants Olinyk and Belmont continued to operate the business until August of 1977. (R. 182, lines 24-25.)

During the time the Winery was operated, plaintiff's officers were never allowed to examine its books and records. (R. 118, lines 17-20; R. 147, lines 24-30.)

ARGUMENT

Point I

THE TRIAL COURT'S FINDING THAT THE PARTNERSHIP WAS NOT EFFECTIVE IS BASED ON SUBSTANTIAL EVIDENCE.

The Court has repeatedly held that in a case tried to the court, when the findings of the trial court are based on substantial evidence, this Court will not disturb them on appe unless the evidence clearly preponderates to the contrary. Se e.g., Fisher v. Taylor, 572 P.2d 393 (Utah 1977); Zions First National Bank v. First Security Bank of Utah, N. A., 534 P.2d 900 (Utah 1975). In this case, appellants have not argued tha the findings of the trial court that the agreed conditions wer never fulfilled and the partnership did not become effective were not based on substantial, admissible and competent evider (Findings of Fact, nos. 3 and 7.)

Instead, appellants argue that either there was de facto compliance with the conditions or a waiver of them. (Appellan Brief, pg. 4.) In support of those propositions, appellants cite certain isolated aspects of testimony. However, as the foregoing statement of facts indicates, the record contains substantial evidence that the conditions had not been met. In addition, defendant Belmont himself testified that condition was not met (R. 178, lines 4-10) and that condition 4 was not satisfied (R. 104, lines 12-20.)

As to the issue whether plaintiff waived performance of

the conditions, appellants have cited no direct evidence in support of their argument that performance of the conditions was waived. This Court has held that "waiver must be an intentional relinquishment of a known right". Bjork v. April Industries, Inc., 547 P.2d 219, 220 (Utah 1976). Nothing in the record supports the contention that plaintiff's officers intentionally relinquished plaintiff's right to performance of the conditions set forth in the agreement.

This Court has held that, on appeal, it must view the evidence, including the fair inferences to be drawn therefrom, in the light most favorable to the successful party below. Carnesecca v. Carnesecca, 572 P.2d 708 (Utah 1977). The inferences to be drawn from the evidence in this case do not support appellant's contentions that the conditions had been met or waived.

POINT II

THE TRIAL COURT DID NOT ERR IN DETERMINING THAT PLAINTIFF WAS NOT ESTOPPED TO DENY THAT THE PARTNERSHIP BECAME EFFECTIVE.

Appellants argue that plaintiff is estopped by its conduct from denying the existence of a partnership. As their sole legal authority for that proposition, appellants cite Utah Code Ann. §48-1-13 (Repl. Vol. 1970). That section provides as follows:

> When a person by words spoken or written or by conduct represents himself, or consents to another's representing him, to anyone as a partner, in an existing partnership or with one or more people not actual partners, he is liable to any such person to whom such representation has been made who has on the faith of such representation given credit to the actual or apparent partnership, and, if he has made such representation or consented to its being made in a public manner, he is liable to such person, whether the representation has or has not been made or communicated to such person so giving credit by, or with the knowledge of, the apparent partner making the representation or consenting to its being made.

The obvious purpose of this section is to guarantee that one who holds himself out as a partner in a partnership and thereby induces third persons to grant credit to the partnership will be liable for partnership obligations. Nothing in the statute is directed toward determining rights and obligations as between and among the partners themselves.

Plaintiff, through its agents, did nothing in this case to represent to defendants that the partnership was effective. In their counterclaim, defendants did not even seek to recover for amounts defendant Belmont may have expended for payment of trade creditors of the operations of the Winery. Nor was a partnership tax return filed.

Appellants seek to rely on certain actions undertaken by plaintiff's agents which appellants contend amount to participation in the partnership business and creating an appearance of the existence of a partnership. However, the issue whether

these actions might have been sufficient to create liability on plaintiff's part to third persons who extended credit to a supposed partnership is not before the Court. Appellants acted with full knowledge of the situation and the existence of the agreement and could not have been said to have relied on the actions of plaintiff's agents. Neither appellant testified that plaintiff's officers represented by words or conduct that plaintiff would not require full performance of the conditions.

This Court has held that an estoppel may occur when conduct by one party leads another party, in reliance on the conduct, to adopt a course of action which results in detriment if the first party is permitted to repudiate his conduct. Carnesecca v. Carnesecca, 572 P.2d 708 (Utah 1977). Appellants have not argued that plaintiff's agents led them to believe that plaintiff would not seek to enforce defendants' obligations under the preliminary agreement (Exhibit 3-P).

Appellants contend that the participation of plaintiff's officers in the operation of the Winery was so extensive that that conduct is sufficient to create an estoppel to deny the existence of a partnership. However, the conduct of plaintiff's officers is consistent with their testimony that defendants represented that there was a great need for haste in opening and operating the private club. Moreover, plaintiff's participation in that operation occurred, for the most part, at the beginning of

the operation. For example, plaintiff's officers assisted in preparing the premises for opening (R. 124, lines 18-25) and acted as greeters during the grand opening (R. 124, lines 25-). During the time the Winery operated, however, plaintiff's officers were not allowed to examine its books and records and in fact in April or May were excluded from the club so that they would not "interfere" with its operations. (R. 191, lines 3-11).

In addition, even after plaintiff filed this action in June of 1977, defendants continued to operate the club. Defendant Olinyk testified that in July he made a $10,000.00 contribution to the operation as required by the agreement signed in March. (R. 218, lines 26-30; R. 214, lines 16-21.) It is difficult to understand how those actions could be said to have been undertaken in reliance on plaintiff's participation once the lawsuit had been filed.

Throughout the short time period that the Winery operated defendants acted with full knowledge of plaintiff's status and the status of the proposed partnership. For that reason, the limited participation by plaintiff's officers in the early stages of the club's operation cannot support an estoppel.

CONCLUSION

The trial court found that defendants agreed to satisfy certain conditions before a partnership would become effective and that those conditions were never met. Those findings are supported by substantial evidence. At the trial, appellant

argued that the conditions were waived and that plaintiff should be estopped to deny the existence of a partnership. Having considered those arguments in the light of the evidence, the trial court determined that the partnership did not become effective. Nothing in the record compels this Court to overturn those findings.

For the foregoing reasons, the judgment of the trial court should be affirmed.

DATED this 1st day of December, 1980.

Respectfully submitted,

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By _____
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MAILING CERTIFICATE

I hereby certify that I mailed two true and correct c
of the foregoing Brief of Plaintiff-Respondent to Mr. George
Speciale, 44 Exchange Place, Salt Lake City, Utah, 84111, p
prepaid, this 1st day of December, 1980.